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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of
Toll Free Service Access Codes

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CC Docket No. 95-155

PETITION FOR RECONSIDERATION

The Toll Free Users' Coalition ("Coalition"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby petitions the Commission for reconsideration of its Fourth Report and Order and Memorandum Opinion and Order in the above-captioned proceeding.¹

I. INTRODUCTION

The Coalition was formed in March, 1996 as a non-profit corporation, for the purpose of preserving the commercial value of toll free service. Coalition members hold vanity numbers in the 800 toll free code, and have invested significant resources promoting and developing their businesses around these vanity numbers. The rules developed in this proceeding will have a direct and substantial effect on the ability of Coalition members to promote their businesses and attract and retain customers through the use of toll free numbers. Individual coalition members participated in earlier stages of this proceeding before the Coalition's formation.² The Coalition is therefore an "interested person" with standing to file this petition for reconsideration.³

¹ Toll Free Service Access Codes, *Fourth Report and Order and Memorandum Opinion and Order*, FCC 98-48 (rel. March 31, 1998) ("Fourth R&O").

² See, e.g., Comments of Vanity International in CC Docket No. 95-155 (filed November, 1995).

³ See 47 C.F.R. § 1.429(a).

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In the Fourth R&O, the Commission determined that holders of toll free numbers in the 800 toll free code that designated particular 888 numbers to be set aside should have a right of first refusal to use those set-aside 888 numbers.⁴ However, the Commission also determined that such a right of first refusal should not extend to toll free codes beyond 888 (such as the newly opened 877 code).⁵ This arbitrary line drawing does not make sense, and the Commission has failed to provide a principled basis for treating the codes differently. The same reasons that require a right of first refusal in the 888 toll free code similarly require a right of first refusal in the 877 and future codes. Moreover, the purported inefficiencies associated with implementation of a right of first refusal simply do not exist. Accordingly, the Commission should reconsider its decision, and award holders of vanity numbers a right of first refusal to the corresponding numbers in future toll free codes as well as in the 888 code.

II. ARGUMENT

A. **Consumer confusion, misdialing, and “free-rider” problems do not justify a distinction between the allocation of vanity numbers in the 888 toll free code and the 877 and succeeding toll free codes.**

The Commission recognized that opening a new toll free code creates problems of consumer confusion, misdialing, and new toll free subscribers “free riding” on the marketing efforts of 800 subscribers. Indeed, the Commission found that these factors compel a decision to grant current 800 subscribers a right of first refusal to the corresponding numbers set aside in the 888 code.⁶ These reasons are *equally* compelling in the case of the 877 area code.

⁴ Fourth R&O at ¶ 32.

⁵ *Id.*

⁶ *Id.* at ¶ 29.

Although the Fourth R&O states that consumers will be less confused with the introduction of the 877 code than they were when the 888 code was introduced,⁷ the Commission offered no evidence to support this claim. In fact, the toll-free codes 888, 877, and 866 are more similar to each other than they are to 800, and consumers may be more confused when presented with an array of three or more closely related possibilities than with only the choice between 800 and 888.

Even if the Commission is correct that consumer confusion will decrease with the introduction of the 877 code, *decreased* confusion is not the same as *no* confusion. The Commission introduced the 800 toll free code in 1967, and in the nearly 30 years that passed until the opening of the 888 code, “800” was synonymous with “toll free.” The Commission opened the 888 code a mere two years ago, introducing the idea of multiple toll free codes for the first time, and it is unreasonable to expect three decades of common usage to be overcome in that short time. Since even the Commission admits that there will still be some consumer confusion with the introduction of the 877 code, it cannot base the denial of a right of first refusal in that code on the lack of consumer confusion.

Although the Commission recognized that misdialing of toll free codes is also a problem,⁸ the agency claims that misdialing will decrease with the introduction of each new toll free code as consumers recognize that each area code is distinct.⁹ However, misdialing is only partly the result of confusion of toll free codes (albeit exacerbated by the problem that some numbers in the 800 and 888 codes are interchangeable and some are not). It may also be the

⁷ *Id.* at ¶¶ 27,29.

⁸ *See id.* at ¶¶ 11, 27.

⁹ *Id.* at 11.

result of inattention or touch-pad error. There is good reason to expect that misdialing actually will *increase* as more 8xx combinations become valid numbers.

The Commission also recognized that a subscriber to a number in a new toll free code that corresponds to an existing toll free vanity number may “free ride” on the often extensive advertising and promotional efforts of the original subscriber.¹⁰ Again, the Commission claimed that free riding will decrease with the introduction of new toll free codes.¹¹ But the Commission has it backwards. Free riding can occur when a competitor subscribes to the number in a new toll free code corresponding to a heavily advertised number in an existing toll free code. When the 888 code was introduced, a consumer who knew only the 7-digit vanity number and simply guessed the toll free code had a 50 percent chance of dialing the advertiser and a 50 percent chance of dialing the free rider. With the introduction of the 877 code, a random guess will dial the advertiser only 33 percent of the time, and the free riders 67 percent of the time.

B. The purported inefficiencies associated with the implementation and administration of a right of first refusal are either exaggerated or nonexistent.

The Fourth R&O states that a right of first refusal is a more “inefficient” procedure for allocating toll free numbers than a first-come, first-served method.¹² This inefficiency derives from two sources, according to the Commission: (i) a right of first refusal would lead to more rapid exhaustion of toll free numbers, and (ii) administration of a right of first refusal is burdensome. Neither of these supposed inefficiencies withstands scrutiny.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 27.

¹² *Id.* at ¶¶ 17-19.

A right of first refusal will not lead to more rapid depletion of the supply of toll free numbers. The Commission supposes that a current toll free subscriber will exercise its right of first refusal to “minimally use” a new toll free number solely for the purposes of preventing competition. However, this supposition is unreasonable. A vanity number is an extremely valuable resource, and will be heavily used whether it is held by a current toll free subscriber or its competitor. Moreover, the Commission has other means at its disposal of deterring hoarding and warehousing of toll free numbers.¹³ Even if the Commission is correct that vanity numbers will be “minimally used,” and its anti-hoarding measures are ineffective, the problem is limited to only about 375,000 of the nearly 8 million vanity numbers available in each toll free code -- a mere 5 percent of all toll free numbers.¹⁴ A right of first refusal has absolutely no effect on the depletion rate of 95 percent of the available toll free numbers. Moreover, any number that would be the subject of a right of first refusal will be reserved immediately under *any* allocation scheme, simply because it is a commercially valuable number that will be of interest to multiple parties. These vanity numbers will never survive past the initial reservation day to be available for general use.

Finally, the Commission is incorrect in its assumption that offering a right of first refusal is administratively burdensome. The Commission presumes that disputes will arise among holders of corresponding vanity numbers in different toll free codes.¹⁵ However, the Commission devotes no discussion to this matter. One possible solution is as follows. If an 800

¹³ See generally Toll Free Access Codes, *Second Report and Order and Further Notice of Proposed Rule Making*, FCC 97-123 (rel. Apr. 11, 1997).

¹⁴ See Fourth R&O at ¶ 21 (only 374,199 numbers were set aside in the 888 code out of approximately 8 million numbers available).

¹⁵ Fourth R&O. at ¶ 19.

subscriber exercises its right of first refusal over the corresponding 888 number, then it is the only subscriber eligible to exercise a right of first refusal over the corresponding 877 number. If the 800 subscriber does not exercise its right of first refusal over the corresponding 888 number, then the 888 subscriber is the only subscriber eligible to exercise a right of first refusal over the corresponding 877 number. A "new" set-aside in the 877 code that was not set aside in the 888 code may only be requested by the holder of a federally registered trademark in the number, which resolves the right of first refusal as well.

III. CONCLUSION

Consistent with the views expressed herein, the Commission should set aside requested numbers in the 877 toll free code and all future toll free codes and award a right of first refusal to those numbers just as it did in the 888 area code.

Respectfully submitted,

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